

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

FRANK GALLARDO-THUNDER
HAWK,

Plaintiff,

vs.

TWO USM'S NAMES UNKNOWN,

Defendants.

CV-17-00004-GF-BMM-JTJ

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS**

Plaintiff Frank Gallardo-Thunder Hawk, a federal prisoner, filed a Complaint and an Amended Complaint *pro se* alleging violations of his constitutional rights during his confinement in a holding cell at the Missouri River Federal Courthouse in Great Falls, Montana. (Doc. 1, 9.) Gallardo-Thunder Hawk named the following Defendants in his Amended Complaint: the United States of America, the State of Montana, United States Deputy Marshal Dana Rossmiller, and two unknown United States Marshals. (Doc. 9 at 3-4, 9.) Gallardo-Thunder Hawk alleges that the two Defendant United States Marshals unlawfully left him in a holding cell for nearly five hours without giving him an opportunity to use the bathroom. (Doc. 1.) Gallardo-Thunder Hawk further alleges that the United States

Marshals' neglect caused him to urinate and defecate on himself, resulting in severe physical and emotional pain. (Doc. 9 at 10.) United States Magistrate Judge John Johnston entered Findings and Recommendations in this matter on July 10, 2017. (Doc. 10.) Neither party filed objections.

When a party makes no objections, the Court need not review *de novo* the proposed Findings and Recommendations. *Thomas v. Arn*, 474 U.S. 140, 149-52 (1986). This Court will review Judge Johnston's Findings and Recommendations, however, for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

Judge Johnston acknowledged that the Court must screen Gallardo-Thunder Hawk's Amended Complaint and dismiss it or portions thereof if it is "frivolous," "fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune." (Doc. 10 at 3-5.) Judge Johnston determined that Gallardo-Thunder Hawk improperly named the State of Montana and Dana Rossmiller as Defendants. *Id.* at 9, 11. Judge Johnston accordingly recommends that the Court dismiss these Defendants and allow the remainder of Gallardo-Thunder Hawk's claims to proceed. *Id.* at 15.

Judge Johnston determined that the State of Montana stands immune from Gallardo-Thunder Hawk's claims on the basis that the Eleventh Amendment generally bars suit in federal court against a state. *Id.* at 9. The State of Montana

has declined to waive its immunity. Mont. Code Ann. § 2-9-101 et seq. Judge Johnston determined that Dana Rossmiller also stands immune from Gallardo-Thunder Hawk's claims. (Doc. 10 at 11.) Judge Johnston reasoned that Gallardo-Thunder Hawk failed to allege that Rossmiller played an affirmative role in the deprivation of his constitutional rights. *Id.* The law requires this showing in order to maintain a claim against an individual on a theory of supervisory liability. *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987).

The Court has reviewed Judge Johnston's Findings and Recommendations for clear error. The Court finds no error in Judge Johnston's Findings and Recommendations, and adopts them in full.

IT IS ORDERED that Judge Johnston's Findings and Recommendations (Doc. 10), is ADOPTED IN FULL.

IT IS FURTHER ORDERED that Defendant Dana Rossmiller and Defendant State of Montana are DISMISSED.

DATED this 31st day of July, 2017.



Brian Morris
United States District Court Judge